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No. 95-6

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

NORFOLK & WESTERN RAILWAY COMPANY,
Petitioner,

v.

WILLIAM J. HILES,
Respondent.

On Petition for a Writ of Certiorari to the Appellate Court of Illinois Fifth Judicial District

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REPLY BRIEF OF PETITIONER

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In its Opposition, respondent makes no effort to dispute petitioner's contention that this Court should grant certiorari to resolve the substantial, recurring conflict among state and federal courts over the interpretation of a provision of the federal Safety Appliance Act ("SAA"). Indeed, respondent does not even bother to discuss the hopelessly tangled case law interpreting 49 U.S.C. § 20302(a)(1)(A). This decisional conflict is reason enough for the Court to grant the petition and decide whether the SAA has been violated when a railroad employee is injured going between two cars to align a drawbar where the equipment is not defective.

Respondent offers three justifications for ignoring the conflict among the circuits and between federal and state courts: 1) the decision below is a correct interpretation of the language, history and policy of the SAA; 2) the decision below is consistent with the teachings of this Court interpreting the statute; and 3) the statutory issue is not sufficiently important to warrant this Court's review because only a handful of people die or suffer serious injuries annually as a result of misaligned drawbars. Each of these points merits a brief reply.

1. At the outset, it is worth noting that respondent's arguments on the merits are premature at the certiorari stage. The fact that five circuits have adopted petitioner's interpretation should be sufficient to demonstrate that, at a minimum, the merits are not so one-sided as to justify ignoring the conflict in the circuits. Nevertheless, the Court should recognize that respondent's statutory analysis is seriously flawed.

First, respondent's "plain meaning" argument is conspicuously unaccompanied by any quotation from the statutory language. Opp. 2-3.[1] He certainly makes no effort to respond to petitioner's argument that the statute is concerned with equipment and *not* operating procedures. Pet. 11-12.

Respondent also fails to address the fact that under his interpretation, nearly every railroad has been in violation of the SAA since the day it was enacted, see *Lisek*

[1] Respondent does quote the Locomotive Boiler Inspection Act ("LBIA"), 45 U.S.C. §§ 22-34, a statute passed over 15 years after passage of the SAA, which is inapposite. *See* Opp. 2-3. The two provisions of the LBIA and the SAA that respondent compares regulate vastly different subjects. The SAA provision mandates the type of equipment required—*i.e.*, automatic couplers—while the LBIA provision is explicitly a safety statute, regulating unsafe locomotives and appurtenances and not requiring any particular type of equipment. *Compare* 49 U.S.C. § 20302(a)(1)(A) *with* 49 U.S.C. § 20701(1).

v. *Norfolk & W. Ry.*, 30 F.3d 823, 831 (7th Cir. 1994), *cert. denied*, 115 S. Ct. 904 (1995), which is at a minimum implausible. Respondent merely states that couplers today are made much better than they were when the SAA was enacted, Opp. 6, but does not (and cannot) argue that the couplers most railroads use will consistently remain aligned during the ordinary use of the railroad car, ensuring that no employees must ever go between cars.

Finally, respondent insists that this Court "stresses the importance of statutory policy," Opp. 3, in interpreting statutes. In fact, this Court has consistently held that "policy" is not a trustworthy guide to statutory interpretation because Congress never pursues "its purposes at all costs." *Rodriguez* v. *United States*, 480 U.S. 522, 526 (1987) (per curiam) ("[I]t frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law."); see also *Landgraf* v. *USI Film Prods.*, 114 S. Ct. 1483, 1508 (1994) ("Statutes are seldom crafted to pursue a single goal."); *Central Bank, N.A.* v. *First Interstate Bank, N.A.*, 114 S. Ct. 1439, 1454 (1994) (holding that "purpose" arguments are insufficient to support expansive interpretation of federal securities laws). Complex legislation, such as the Safety Appliance Act, cannot be interpreted solely according to one simplistic policy; otherwise, the SAA's strict liability would apply to all injuries, and the FELA's negligence standard would be supplanted to ensure recoveries for all accidents.

2. The Court's holding in *Affolder* v. *New York, Chicago & St. Louis Railroad*, 339 U.S. 96 (1950), upon which respondent relies heavily, is ambiguous as to what the SAA requires in this case. Respondent admits that *Affolder* holds that a carrier has a defense to liability under the SAA if couplers that failed to perform properly were not correctly opened before the attempt to couple. *Affolder*, 339 U.S. at 99, 101; see Opp. 6-7. The logic of that defense seemingly applies in misaligned drawbar

cases such as this one, and two circuits have so interpreted *Affolder*. See *Kavorkian* v. *CSX Transp., Inc.*, 33 F.3d 570, 575 (6th Cir. 1994); *Reed* v. *Philadelphia, Bethlehem & New Eng. R.R.*, 939 F.2d 128, 132 (3d Cir. 1991).

3. Contrary to respondent's assertions, the issue presented, albeit narrow, has significant and recurring practical importance. Respondent rather ghoulishly suggests that this case is not worthy of review because not enough people are killed or injured each year straightening drawbars between railroad cars to make the issue important. See Opp. 1-2, 6.[2] This is a rather macabre and unduly narrow standard of importance. Perhaps if large numbers of railroad employees died each year from drawbar alignment situations, that would be a singularly compelling reason to hear this case. Respondent's novel morbidity and mortality standard ignores the more fundamental point, which is that this issue is clearly recurring and has arisen with frequency in both state and federal courts.[3] The fact that there are seven circuit courts of

[2] Respondent's premise for this argument is also based on his selective inclusion of statistics from the single year that supports his position. According to recent Federal Railroad Administration tables that respondent did not cite, accidents while adjusting couplers accounted for 27 injuries or fatalities in 1992, 30 in 1991, 35 in 1990, and 31 in 1989. Accident/Incident Bulletin Nos. 158-161, U.S. Dep't of Transp., Fed. R.R. Ass'n Office of Safety, Tables 66 & 67 (June 1990, July 1991, July 1992, July 1993). These numbers do not even include the FRA's nebulous category of other accidents that occurred while coupling or uncoupling cars, which accounted for 36 injuries or fatalities in 1993, 34 in 1992, 58 in 1991, 47 in 1990, and 34 in 1989. *Id.*; Accident/Incident Bulletin No. 162, U.S. Dep't of Transp., Fed. R.R. Ass'n Office of Safety, Tables 66 & 67 (June 1994). These numbers explain the large number of appellate cases on this issue. *See* note 3, *infra*.

[3] *See, e.g., Kavorkian* v. *CSX Transp., Inc.*, 33 F.3d 570 (6th Cir. 1994); *Lisek* v. *Norfolk & W. Ry.*, 30 F.3d 823 (7th Cir. 1994), *cert. denied*, 115 S. Ct. 904 (1995); *Goedel* v. *Norfolk & W. Ry.*, 13 F.3d 807 (4th Cir. 1994); *Reed* v. *Philadelphia, Bethlehem*

appeals that have decided this precise issue makes this matter worthy of this Court's attention.

Moreover, injuries to railroad employees constitute only one side of this legal coin. While respondent argues that "casualties from adjusting couplers are not a major nationwide concern," Opp. 2, the Association of American Railroads' ("AAR") *Amicus* Brief amply demonstrates the substantial impact lawsuits from employee claims have on the railroad industry. AAR *Amicus* Br. 2.

More fundamentally, this split of judicial authority is an open invitation for railroad employees to forum shop. *Id.* at 6-8. When a case's outcome depends *exclusively* on a litigant's choice of courthouse, it is time for this Court to intervene.[4]

Ultimately, the problem facing the Court is not a "safety problem" for Congress to address, as respondent suggests. Opp. 8. It is a problem of statutory interpretation, and must be resolved because conflicting interpreta-

& New Eng. R.R., 939 F.2d 128 (3d Cir. 1991); *Maldonado* v. *Missouri Pac. Ry.*, 798 F.2d 764 (5th Cir. 1986), *cert. denied*, 480 U.S. 932 (1987); *Coleman* v. *Burlington N., Inc.* 681 F.2d 542 (8th Cir. 1982); *Metcalfe* v. *Atchison, Topeka & Santa Fe Ry.*, 491 F.2d 892 (10th Cir. 1974); *Buskirk* v. *Burlington N., Inc.*, 431 N.E.2d 410 (Ill. App. Ct.), *cert. denied*, 459 U.S. 910 (1982); *Schaaf* v. *Chesapeake & Ohio Ry.*, 317 N.W.2d 679 (Mich. Ct. App. 1982), *cert. denied*, 464 U.S. 848 (1983); *Plouffe* v. *Burlington N., Inc.*, 730 P.2d 1148 (Mont. 1986).

[4] Respondent disingenuously suggests, Opp. 7, that review is unwarranted because railroad employee plaintiffs will merely add counts in their complaint under the FELA. But respondent did not do that here, and for good reason. Respondent chose to sue in Illinois state court, where strict liability under the SAA is the rule, *see Buskirk* v. *Burlington N., Inc.*, 431 N.E.2d 410 (Ill. App. Ct.), *cert. denied*, 459 U.S. 910 (1982), and adding a count under the FELA would only make a railroad employee vulnerable to a defense of contributory negligence. In fact, plaintiffs will *not* elect to add a count under the FELA where they have the advantage of strict liability under the SAA because they do not want to be exposed to the unnecessary risk of contributory negligence evidence.

tions are resulting in substantial unfairness to the railroad industry and unacceptable forum shopping by railroad employees. Therefore, certiorari should be granted to determine whether a railroad employee who goes between two cars to straighten a misaligned drawbar and is thereby injured is entitled to judgment as a matter of law under the SAA, even if there is no evidence that the drawbar was defective.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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